88-529 (1)

Supreme Court, U.S.
FILED
SEP 6 1988
CLERK

IN THE SUPREME COURT

of the

UNITED STATES

October Term 1988

No._____

JAMES P. YOUNGBERG

DBA

MAKI

V

THE UNITED STATES

PETITIONER

RESPONDENT

PETITION for WRIT of CERTIORARI to THE UNITED STATES COURT of APPEALS for the NINTH CIRCUIT

JAMES P. YOUNGBERG
MAKI
201 Spartan Village
Wrightstown, N.J. 08562
609-723-7060

34

QUESTIONS PRESENTED FOR REVIEW

1. Whether due process for damage due to delay, is, due process for damage due to illegal restrain.

2. Whether a contract continuation as provided in TITLE 41 UNITED STATES CODE SECTION 11 (b) 2: is a illegal restrain or a unreasonable delay. When Petitioner was not informed of its right of contract determination, after, a 30 day suspension by a contracting agency.

NOTE: Rule 28.1

Maki is the trade name for, JAMES P. YOUNGBERT individual doing busines with a Agency of The United States.

Prefix

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PREFIX

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

No. _____

MAKI

PETITIONER

V.

THE UNITED STATES

RESPONDENT

PETITION for WRIT of CERTIORARI to the UNITED STATES COURT of APPEALS for the NINTH CIRCUIT

The petitioner, MAKI, respectfully prays that a writ of certiorari issue to review the judgement of the UNITED STATES COURT of APPEALS for the NINTH CIRCUIT entered on 16, June 1988

OPINION BELOW

The Court of Appeals entered its decision, affirming the Petitioner's Reconsideration Motion, dated 16, June 1988 denied. Appendix A.

JURISDICTION

The jurisdiction of this Court is envoked under Title 28, United States Code Section 1254 (65).

CONSTITUTIONAL PROVISIONS INVOLVED

1. UNITED STATES CONSTITUTION, Amendment V. Nor shall any person..be deprived of life, liberty, or property, without due process of law

STATEMENT

The Appeals Court agreed with CL., CT., requesting the Petitioner to provide proof of damage based on delay.

This task was impossible, for had Petitioner complied, it would have been guilty of fraud as stated by auditor for agency./1

Petitioner's Certified-Claim of 28, April 1984, as written is a claim of "a lot more than a unreasonable delay." Also add the letter of the Petitioner confirming the Navy's desire to make a example of Maki,

dated 6, August 1984./2. Could this be entrapment?

/1. Appendix D page (7) beginning ...Finally ending fraudulent.

/2. Complaint dated 15, May 1985 Fact 10 Attachment.

2. UNITED STATES CONSTITUTION,

AMENDMENT XIII

Nor involuntary servitude, except as punishment for crime....under bondage

STATEMENT

The Congress of the United States found it necessary to add protection for contractors doing business with agency, contracting officer's this being Title 41 United States Code 111 (b) 2.

The Agency, Justice Dept. Claims Court, & Appeals all agree that, Congress's Code advising the Agency it MUST notify the contractor of its RIGHT of CONTRACT DETERMINATION after 30 day suspension, or make the Code 111 part of the contract

specification. FAILURE to do so only allows the contractor damage based on delay

Petitioner's Certified*Claim of 28, April, 1984, states "I believe that I cannot offer a responsible bid without the above listed monies being resolved." The Navy demanded the Petitioner to continue, or risk having its contract canceled and the bonding company taking over its contract. The claim proves that the Petitioner continued its contract INVOLUNTARY.

REASON FOR GRANTING THE WRIT

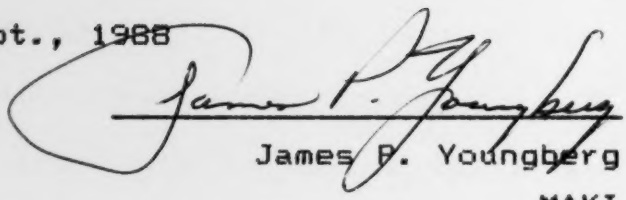
Where the Petitioner's was denied due process of providing proof of damage due to illegal restrain rather than Government delay.

CONCLUSION

For the foregoing reasons, petitioner, MAKI, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Sincerely

DATED 23 Sept., 1988



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NOTE: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

88-1262

MAKI

Plaintiff-Appellant.

V.

THE UNITED STATES

Defendant-Appellee

DECIDED: June 16, 1988

Before FRIEDMAN, NEWMAN, and ARCHER, Circuit Judges PER CURIAM.

The amended judgment of the United States Claims Court, 13Cl. Ct. 779 (1987),

granting summary judgment for the appellant for $3,744.33 plus interest from April 28, 1984, and granting summary judgment for the United States on the balance of the appellant's claim, is affrimed on the basis of the opinion of the claims court.

END

(A)

IN THE UNITED STATES CLAIMS COURT

NOTICE

MAKI

No. 288-85C

V.

THE UNITED STATES

Clerk's Office

Washington, D.C. January 26, 1988

To Attorney of Record, Assistant Attorney General, and Judge Andewell:

Please take notice that in the above case there has been entered this day on the plaintiff's motion, filed January 26, 1988, for review pursuant to rule 59

The following order by the Judge:

DENIED for the reasons set forth in this court's order of December 21, 1987.

S/1_____

FRANK T. PEARTREE, Clerk

END

(B)

IN THE UNITED STATES CLAIMS COURT

MAKI

Plaintiff

v

No.288-85C

THE UNITED STATES (Filed: Dec.21, 1987)

Defendant

ORDER

On December 17, 1987, plaintiff moved for reconsideration of this Court's opinion of December 9, 1987. In its motion, plaintiff argues for the first time that it is entitled to the full amount of its certified claim because defendant failed to apprise Maki of the existence of 41 U.S.C. 111 (b) (2). But this Court's opinion of December 9, 1987, was not predicated on the conclusion that the Government was not subject to damages for any of its actions. Rather, that opinion was predicated on plaintiff's failure to meet its burden to substantiate the damages it claimed.

C

Plaintiff's motion for reconsideration contains nothing that suggests that plaintiff has adequately substantiated its claim.

Accordingly, plaintiff's motion is DENIED

S/1

ROGER B. ANDEWELT

JUDGE

END

(C)

IN THE UNITED STATES CLAIMS COURT

No. 288-85C

(Filed December 9< 1987)

MAKI

Plaintiff

V

THE UNITED STATES

Defendant

*Contract: summary
*Judgment: effect of
*contracting officer's
*failure to render timely
*claim: contractor's
*burden of proving
damages resulting from
Government delay
liquidated damages.

James P.Youngberg, Wrightstown, N.J. appearing pro se for plaintiff.

Stuart James, Washington, D. C. with whom was Assistant Attorney General Richard K. Willard, for defendant.

OPINION

ANDEWELT, JUDGE

In this action, plaintiff charges the Department of the Navy with breach of a contract under which plaintiff was to

construct a facility for keeping dogs used in drug detection work. The action is presently before this Court on cross-motions for summary judgment. Plaintiff seeks judgment in the amount of $472,857.00; defendant does not contest $3,733.44 of plaintiff's claim but disputes the remainder. For the reasons explained here, plaintiff is granted summary judgment only to the extent of its uncontested claim for $3,733.44, and defendant's cross-motion is granted as to the remainder of plaintiff's claim.

FACTS

The contract in issue, Contract No. N6247 2-83-C5840 was awarded to Maki by the Department of the Navy on Sept. 30, 1983. The contract called for Maki to build a dog facility by Jan. 13, 1984. The contract was $37,330.00.

Maki received notice to proceed with performance of the contract on Nov. 4, 1983. On Nov. 9, 1983, the Navy issued a

requirement that all military working dog kennel facilities be approved by the Chief of Naval Operations. In a letter dated Nov. 16, 1983, the Navy informed Maki that "(a) change in criteria for the construction of (the contract) facilities has been made.. we will notify you as soon as possible after a determination of the required changes, if any, that must be incorporated in to your contract." Maki was told in the letter "to refrain from accomplishing any work or procuring any materials for (the) referenced contract until you receive further authority....

Approximately five months later, in a letter dated April 23, 1984, the Navy provided Maki with a set of revised design specifications for the dog facility, and requested that Maki submit a bid proposal for "The inclusion under the subject contract" of the revised specifications. In its response dated April 28, 1984, Maki did not submit a

new bid but instead submitted a certified claim for delay damages under para. 17 (b) of the contract. That paragraph provides;

If the performance of ... the work is, for any unreasonable period of time, of suspended, delayed or interrupted by an act within the time specified in this contract (or if no time is specified within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay or interruption and the contract modified in writing accordingly.

In its certified claim Maki sought $2,932.00 to cover certain expenditures arising prior to Nov. 8, 1983, a "contractor fee" of $800.00 per day from Nov. 8, 1983 until the date the claim was settled, and "liquidated damages" of $1,575.00 per day from Sept. 30, 1983 until the date the claim was settled. Maki claimed that the Navy had

unreasonably delayed its submission of the revised specifications, and that Maki could not offer "responsible bid" for construction of the dog facility under the revised specifications until its certified claim for delay damages was resolved.

Maki subsequently met with Navy personnel to discuss the contract and, by letter dated May 10, 1984, submitted a $58,343.00 bid for construction of the dog facility according to the revised specifactions. The Navy responded in a May 22, 1984 letter that Maki's bid was "excessive" in that it called for 56% inflation in eight months for what amounted to only 75% of the original work. The letter went on to state; "Considering your price, this office is considering terminating the contract for convenience. Please submit your proposal for your expenditures on the enclosed forms, in order that we may negotiate a fair and equitable settlement."

By letter dated May 30, 1984, Maki submitted the requested expenditure proposal. In its breakdown estimate of direct costs, Maki sought a total of $551,232.00. This figure included a "contractor fee" of $164,000.00 ($800 per day for 205-day period from Nov. 8, 1983 to May 30, 1984) and "damages" of $384,000.00 ($1,575.00 per day for the period from Sept. 30, 1983 to May 30 1984).

The Navy forewarded Maki's proposal, for expenditures to the Defense Contract Augid Agency ("DCAA") for verification. After conducting an audit, the DCAA auditor, in a Nov. 2, 1984 report stated:

Maki has no books or records to support any of the cost claimed by Mr. Youngberg (Maki's individual owner)... The records only support several minor expenditures made by Maki... The contractor furnished us with invoices from Chesley & Cline Insurance Brokers, but refused to provide us with proof

of payment (cancelled checks) ...Finally, the value of the basic contract was under $60,000.00. Therefore, the inclusion of a contractor's fee of $164,000.00 and liquidated damage request of $284,800.00, is almost fraudulent.

The auditor concluded that Maki substantiated only $790.00 of the $551,232.00 Maki Claimed.

By letter dated Nov. 14, 10984, the government terminated the contract for its convenience. In the Nov. 14, 1984, termination letter, Maki was advised that its certified claim would be considered its termination claim unless Maki advised the Government differently.

On Jan 12, 1985, Maki informed the Government that it took exception to its claim being considered a termination claim. Maki did not, however, submit a different termination claim. On Mar. 13, 1985 the contracting officer rendered a final decision

with respect to Maki's certified claim, finding that, for work performed, Maki was entitled to $3,744.33, including its direct costs, home office overhead, and interest.

On May 15, 1985, Maki filed its complaint with this Court, seeking review of the contracting officer's decision, and damages in amount of $472,857.00 due as of April 28, 1984.

DISCUSSION

A granting of summary judgment is appropiate only where there is no genuine issue of material fact (i.e., a fact that might affect the outcome of the suit) and the movant is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505,2510, (1986). See Mingus Constructors, Inc., v. United States, 812F. 2d 1387, 1390 (Fed. Cir. 1987). The moving party bears the burden of establishing the absence of any genuine issue of material fact that burden may be discharged by pointing out

to the Court that there is an absence of evidence to support the non-moving party's case, i.e., an absence of evidence as to a material fact on which the non-movant bears the burden of proof. Celotex Corp. v. Catrett, 106 S. Ct. 2548,2554 (1986). When the moving party successfully discharges its burden in this way, to defeat the summary judgment motion, the non-movant must present sufficient evidence as to the existence of that fact so that the trier of fact could reasonably find in favor of the non-movant. See liberty lobby, 106 S. Ct. 2512. The Federal Circuithas delineated the non-movant party's burden in this respect as follows:

The non-movant may not rest on its conclusory pleadings but, under rule 56, must set out, usually in an affidavit by one with knowledge of specific facts, what specific evidence could be offred at trial. Barmag Barmer Maschinenfabrik AG v.Murata Machinery, Ltd., 731 F. 2d831,836,221 USPQ 561,564

(Fred. Cir. 1984). Sweats Fashions, Inc. v. Pannill Knitting co., F2d_____No. 87-1229,slip op. at 5 (Fed. Cir. Nov. 13, 1987) (qouting Pure Gold, Inc. v. Syntex (U.S.A.) Inc. 739 F. 2d 624,626027 (Fred. Cir. 1984).

A. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff's motion for summary judgment is based on the Navy's admitted failure to satisfy its obligations under para. 6 (e) of the contract, which, in pertinent para provides:

6. DISPUTES (1980 JUN)

(e).... For contractor-certified claims in excess of $50,000.00 the Contracting Officer must decide the claim within 60 days or notify the Contractor of the date when the decision will be made. Maki contends that the contracting officer failed to make the required decision or to provide the required notification within 60 days of Maki's Apr. 30, 1984 certified claim, the Navy is in "default" under the contract i.e., the Navy

can no longer contest the damages due, and must pay the full amount requested in the certified claim. Maki's argument, however, is based on a misunderstanding of the contract terms and the applicable law.

A contractor seeking damages for unreasonable delay by the Government has the burden of establishing its damages with reasonable accuracy, and the Government is free to dispute the damages alleged. Wunderlich Contracting Co., v. United States, 173 Ct. C1. 180, 199, 351 F. 2d 956, 968 (1965); Roberts v. United States, 174 Ct. C1. 940. 946, 357 F. 2d 938, 949 (1966); G. M. Shupe Inc. v. United States, 5 Ct. C1 662,737 (1984). There is nothing in the contract or the controlling statutes that suggests a different rule should apply to Maki.

Indeed, Maki's contract specifically provides that all disputes under the contract are to be resolved pursuant to the Contract Disputes Act of 1987, Pub. L. No. 95-56392

Stat. 2383 (41 U.S.C. 601. et seq). 1/ That Act in pertinent part provides:

1/ The "Disputes" section of the contract at Section 6, provides;

(a) This contract is subject to the Contract Disputes Act of (P.L. 95-563)

Footnote Continued (later)

Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal (before the Contract Board of Appeals) or suit (in the United States Claims Court). 41 U.S.C. 605 (c) (5). Thus, rather than providing that the contractor is entitled to the entirety of its certified claim, the controlling statute, which is specifically referenced in the contract, merely provides that the claim will be deemed denied and that the contractorcan, through appeal or suit contest that denial.

Once such an appeal or suit is instituted, the United States is permitted to contest a contractor's entitlement to damages sought. Accordingly, plaintiff's motion for summary judgment based on its "default" theory is denied. Plaintiff's is entitled to the judgment only for $3,733.44, plus interest which defendant does not contest.

B. DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Defendant's cross-moves for summary judgment on the ground that the facts and attachments Maki submitted with its complaint the sole information Maki indicated in its pretrial submission it would present at trial are insufficient as a matter of law to support a claim for damages in excess of $3,733.44. Defendant is correct.

1/ Footnote Continued

(b) Except as provided in the Act

All disputes arising under or relating to this contract shall be resolved in accordance with this clause.

(Emphasis added)

2/ Maki's pretrial submission was submitted in response to the Court's pretrial order of Aug. 20, 1985, which obligated the parties to identify the documents and witnesses that they intend to present at trial. Maki's pretrial submission indicates that it will"rely on facts and attachments submitted in its complaint" and that it "plans no witnesses at this time."

Plaintiff has not established any factual or legal basis for the additional damages it seeks in the form of "liquidated damages" and a "contractor fee"

1. CLAIM FOR LIQUIDATED DAMAGES

Maki's April 28, 1984, certified claim indicates that $1,575.00 per day in liquidated damages was calculated as follows (emphasis added):

LIQUIDATED DAMAGES DETERMINED BY CONTRACT

$15.00 per day x (times) length of contract (105) one hundred and five days to the day Dept. of Navy settles my company's claim but review of the contract reveals absolutely no basis for a claim by Maki for liquidated damages. The contract contains a specific provision covering liquidated damages, but that provision makes liquidated damages a vailable only to the Navy, not to Maki. 3/ There is no other provision inthe contract and nothing in the "facts and attachments submitted in Maki's complaint" that provides any possible bais for implying an obligation on the Government to pay liquidated damages, Se Tobin v. United States, 103 Ct. C1. 480, 493 (1945)

2. CLAIM FOR A CONTRACTOR FEE

Maki provides even less information with respect to its claim for a "contractor fee" of $800.00 per day. As explained above, Maki seeks this fee under paragraph 17 (b) of the

case of unreasonable delay, "for any

3/ General Papr. 6 ofSect. 01011 of the contract provides:

Liquidated Damages: In case of failure on the part of the Contractor to complete the work within the time fixed in the Contract or extensions thereof, the Contract or shall pay to the Government as liquidated damages for the work remaining incomplete at close of business on that day, pursuant to Clause: "Termination for Default-Damages for Delay-Time Extention" of the General Provisions, the sum of $15.00 for each day of delay. Increases inthe cost of performance of this contract (excluding profit)..."But there isnothing in the "facts and attachments in the compalint" that suggests how Maki calculated a fee of $800.00 per day or how this fee in any way relates to any "increase inthe cost of performance of the contract."

The only explanation of the basis for the "contractor fee" claim in the documents submitted by the parties is a Feb. 12, 1985, memorandum submitted by the Government's perspective, negotiations between Mr. Youngberg, president of Maki, and Navy officials. According to that document, Mr. Youngberg analogized the contractor's fee to that of a lawer's or doctor's fee and contended that Maki was entitled to a contractor's fee becauseit could not bid on other jobs during the period of suspension because of "loss of bidding capacity." 4/

In seeking damages for "loss of bidding capacity," Maki appears to be claiming the profits that it otherwise could have earned had it not been prevented by the Government's suspension from bidding on other contracts but para. 17 (b) of the contract expressly excludes claims for loss "profit. Holloway Construction Co. v. United States 4 C1 Ct. 799, 789 (1984). In any event in breach of

contract cases where the contractor alleged that an unreasonable delay by the Government led to financial difficulties or impaired the contractor's overall business, the courts have denied such damages on the ground that they were consequential, remote and speculative, hence, not recoverable, See Ramsey v. United States 121 Ct. Cl. 426, 433 (1952): Myerle v. United States, 33 Ct. Cl. 1.27 (1898); Ardini & Pfau Inc. ASBCA No. 8602, 64 B.C.A. 4237.

3. MAKI HAS HAD AMPLE OPPORTUNITY TO SUBSTANTIATE ITS CLAIM

Maki is represented Pro se by its owner Mr. Youngberg, and the Court was concerned that Mr. Youngberg maynot have understood the legal consequences of its actions during the course of the litigation.

4/ At oral argument, Mr. Youngberg further explained his "loss of bidding capacity." He asserted that he "had a bond for say, roughly

$40,000.00, which had $100,000.00 of (his) equity tied up for better than 14 months..." and that he "couldn't do a thing without the government releasing the bond (he) gave them. Consequently at oral argument the Court explained that if limited to the record presently before it which did not provide any factual or legal basis for plaintiff's claims for liequidated damages and a contract or fee, the Court likely would deny plaintiff's motionfor summary judgment and grant defendant's cross-motion. The Court informed Mr. Youngberg that Maki would be provided one additioal opportunity to provide such a basis for its claim. In an order dated Sept. 18, 1987 the Court authorized plaintiff to supplement its opposition to defendant's cross-motion, stating:

The addendum should not contain merely board allegations of damages. Plaintiff should, if possible, substantiate the claims through affidavits and documents that explain

the factual basis for plaintiff's claim thqfered damages of $472,857.00.

Plaintiff filed an addendum, but it not provided additional facts tending to substantiate plaintiff's claim.

Both during its negotiations with the Navy and before this Court plaintiff has either refused or has not been able to sustantiate its claim. Defendant has pointed to the resulting absence of factual evidence in support of plaintiff's damage claim and demonstrated the absence of any issue of material fact. See Celotex, 106 S. Ct. at 2554. The burden, therefore, shifted to plaintiff to demonstrate the existence of a genuine issue of material fact. See Liberty Lobby, 106 S. Ct. 2512. Plaintiff has not met this burden; it has not provided facts that would permit a finding by the trier of fact that it is entitled to any damages in excess of those that are uncontested by defendant.

CONCLUSION

For the foregoing reasons, plaintiff is granted summary judgment only to the extent of its uncontested claim for $3,733.44 Defendant's cross-motion is granted as to the remainder of plaintiff's claim. Judgment shall accordingly be entered for plaintiff in the amount of $3,733.44 plus interest there on pursuant to 41 U.S.C. 611, computed from April 30, 1984. Each party shall bear its own costs.

S/1

ROGER B. ANDEWELT

JUDGE